IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION, et al., *Petitioners,*

v.

HON. HUGH STUART, *Respondent.*

BRIEF OF THE WASHINGTON POST COMPANY, AMERICAN BROADCASTING COMPANIES, INC., THE TIMES MIRROR COMPANY, THE GLOBE NEWSPAPER COMPANY, NEWSDAY, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE KANSAS CITY STAR COMPANY, THE HOUSTON POST COMPANY, THE PULITZER PUBLISHING COMPANY, MINNEAPOLIS STAR AND TRIBUNE COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, THE DENVER PUBLISHING COMPANY, THE TIMES HERALD PRINTING COMPANY, THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, THE COPLEY PRESS, INC., THE A. S. ABELL COMPANY, TIMES PUBLISHING COMPANY, TENNESSEAN NEWSPAPERS, INC., KEARNS TRIBUNE CORPORATION, PRESS-ENTERPRISE COMPANY, SUN NEWSPAPERS OF OMAHA, INC., KEYSTONE PRINTING SERVICE, INC., THE CONSOLIDATED PUBLISHING COMPANY, THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VIRGINIA, THE SUSQUEHANA PUBLISHING COMPANY, AND HERALD REGISTER PUBLISHING COMPANY, AMICI CURIAE, IN SUPPORT OF REVERSAL

On Writ of Certiorari to the Supreme Court of Nebraska

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On Writ of Certiorari to the Supreme Court of Nebraska

Twenty-five newspaper publishers and a broadcasting company submit this brief as *amici curiae* in support of petitioners' claim that the judgment of the Supreme Court of Nebraska, entered on December 1,

1975, should be reversed. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk, and are appended to this brief.

OPINIONS BELOW

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth in the Appendix to the Amended Petition for Certiorari (hereinafter, "Cert. Pet'n Appendix") at p. 1a and p. 9a. The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975 is set forth in the Cert. Pet'n Appendix at p. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975 is set forth in the Cert. Pet'n Appendix at p. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975 is set forth in the Cert. Pet'n Appendix at p. 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975 is set forth in the Cert. Pet'n Appendix at p. 35a. The majority and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975 are set forth in the Cert. Pet'n Appendix at p. 44a and are reported at 63 Neb. S.C.J. 783, —— N.W. 2d ——. The Orders of this Court, dated December 8, 1975 and December 12, 1975, *inter alia*, granting the motion of petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting the Petition are set forth in the Cert. Pet'n Appendix at p. 70a and p. 71a. Except as indicated above, none of the opinions below has thus far been reported.

JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the news media of information revealed in public court proceedings, in public court records, and from other sources about crimes and pending judicial proceedings.

2. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the

publication by the press of information which does not relate to national security and which would not surely result in direct, immediate and irreparable injury to the nation or its people.

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, the injunction of the Nebraska Supreme Court dated December 1, 1975 prohibiting publication by the petitioners can be sustained as a matter of fact and law on this record.

INTEREST OF THE AMICI

Amici are 25 publishers of general circulation newspapers and a broadcasting company. They frequently report to the public on the progress of criminal cases. *Amici* represent a broad spectrum of the American newspaper publishing industry. They are located in great cities and small towns in states as diverse as Massachusetts, Alabama, Colorado, Minnesota, Illinois, California, Nebraska, Virginia, and Texas, among others. They are diverse in size—with average circulations ranging from over one million daily to under 5,000 weekly. Each weekday their combined average circulation is nearly seven million. They are also diverse in editorial viewpoint.

The Washington Post Company and its subsidiaries publish *The Washington Post* (cir. 538,000), *The Trenton Times* (cir. 74,000), and *Newsweek* (weekly cir. 10,900,000), and own and operate television and radio stations.

American Broadcasting Companies, Inc. operates national television and radio networks, and owns and operates television and radio stations.

The Times Mirror Company publishes the *Los Angeles Times* (cir. 1,038,000).

The Globe Newspaper Company publishes *The Boston Globe* (cir. 453,000).

Newsday, Inc. publishes *Newsday* (cir. 450,000).

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald* (cir. 402,000).

The Kansas City Star Company publishes *The Kansas City Times* (cir. 326,000), *The Kansas City Star* (cir. 302,000), and the *Sunday Kansas City Star* (cir. 400,000).

The Houston Post Company publishes *The Houston Post* (cir. 309,000).

The Pulitzer Publishing Company publishes the *St. Louis Post-Dispatch* (cir. 275,000), *The* (Tucson) *Arizona Daily Star* (cir. 59,000), and *The Arizona Sunday Star* (cir. 106,000).

Minneapolis Star and Tribune Company publishes the *Minneapolis Star* (cir. 242,000) and the *Minneapolis Tribune* (cir. 223,000).

Des Moines Register and Tribune Company publishes *The Des Moines Register* (cir. 229,000), *Des Moines Sunday Register* (cir. 433,000), *Des Moines Tribune* (cir. 95,000), and *The Jackson* (Tenn.) *Sun* (cir. 31,000).

The Denver Publishing Company publishes *Rocky Mountain News* (cir. 224,000).

The Times Herald Printing Company publishes *The Dallas Times Herald* (cir. 222,000) and *The Saturday Times Herald* (cir. 251,000).

The Courier-Journal and Louisville Times Company publishes *The Courier-Journal* (cir. 211,000), *The Louisville Times* (cir. 165,000), and *The Courier-Journal & Times* (Sunday cir. 345,000).

The Copley Press, Inc. publishes *The San Diego Union* (cir. 180,000) and *San Diego Tribune* (cir. 125,000).

The A. S. Abell Company publishes *The* (Baltimore) *Sun* (cir. 172,000), *The Evening Sun* (cir. 176,000), and *The Sunday Sun* (cir. 345,000).

Times Publishing Company publishes *The St. Petersburg Times* (cir. 171,000), and the *Evening Independent* (cir. 32,000).

Tennessean Newspapers, Inc. publishes *The* (Nashville) *Tennessean* (cir. 133,000).

Kearns Tribune Corporation publishes *The Salt Lake Tribune* (cir. 101,000).

Press-Enterprise Company publishes *The* (Riverside, Cal.), *Press* (cir. 33,000), *The Daily Enterprise* (cir. 53,000), and *The Press-Enterprise* (Sunday cir. 89,000).

Sun Newspapers of Omaha, Inc. publishes the *Omaha Sun* newspapers (combined weekly cir. 40,000).

Keystone Printing Service, Inc. publishes *The* (Waukegan, Ill.) *News-Sun* (cir. 40,000) and *The Libertyville Independent-Register* (weekly cir. 7,000).

The Consolidated Publishing Company publishes *The Anniston* (Ala.) *Star* (cir. 28,000).

The Free Lance-Star Publishing Company of Fredricksburg, Virginia publishes the *Free Lance-Star* (cir. 23,000).

The Susquehana Publishing Company publishes *The* (Havre de Grace, Md.) *Record* (weekly cir. 7,300).

Herald Register Publishing Company publishes the *Grinnell* (Iowa) *Herald-Register* (weekly cir. 4,250).

All these *amici* would be adversely affected in their capacity to report the news to the American public if the decision of the Nebraska Supreme Court were permitted to stand.

STATEMENT

On October 18, 1975, a multiple murder was committed in Sutherland, Nebraska. The next day, Erwin Simants was charged with the crimes; and a preliminary hearing was set for October 22 in the County Court of Lincoln County, Nebraska. On October 21, the prosecutor moved for an order imposing prior restraints on news media coverage of the case. Defendant Simants moved for a broader order that would close the preliminary hearing altogether to the press and the public.

On October 22, the County Court entered a prior restraint. Although no evidence had been taken concerning any risk to a fair trial, the County Court found that:

> "there is a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial in the matter now pending before this Court."

On the basis of this totally unsupported "finding," the County Court issued an order completely barring public discussion of the evidence offered at the prelim-

inary hearing. The order provided that no participant in the proceeding "nor any other person present in Court, shall release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." The court then went on to issue an even broader prohibition on public discussion of the case:

> "IT IS FURTHER ORDERED that no party to this case, law enforcement official, public officer, attorney, witnesses or news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosures and Reporting of Information Relating to Imminent or Pending Criminal Litigation, a copy of which is attached hereto and made a part hereof."

The court made certain limited exceptions from its order.[1] Finally, the County Court provided that its order would remain in effect "until modified or rescinded by a higher court or until the defendant is ordered released from these charges." The order contained no provision for termination of the gag upon conviction of the accused.

[1] The exceptions were: (1) "Factual statements of the accused person's name, age, residence, occupation, and family status." (2) "The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation." (3) "The nature, substance, and text of the charge, including a brief description of the offenses charged." (4) "Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records or communications heretofore disseminated to the public." (5) "The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session." (6) "A request for assistance in obtaining evidence." (7) "A request for assistance in the obtaining of evidence or the names of possible witnesses."

The Bar-Press Guidelines incorporated in the County Court order contain a preamble, which provides:

> "These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process. As a voluntary code, these guidelines do not necessarily reflect in all aspects what the members of the bar or the news media believe would be permitted or required by law."

Despite these provisions, the court converted this voluntary code into a court order enforceable by the contempt power.

The preliminary hearing was held as scheduled on October 22, after the entry of the foregoing gag order; and defendant Simants was bound over to the District Court of Lincoln County for trial.

On the following day, the Nebraska Press Association and the other petitioners moved in the District Court to intervene in the criminal case for the purpose of challenging the gag order that had been entered by the county court. The motion was granted. Defendant Simants moved to continue the county court gag order in effect.

On October 27, the District Court, *per* Judge Hugh Stuart, the respondent, terminated the county court gag order, and entered a new order of its own. Although no evidence had been taken on the issue, the District Court made a new "finding":

> "THE COURT, BEING DULY INFORMED, FINDS because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial and that an order setting forth the limitations of pre-trial publicity is appropriate, and an order for the news media and the public's accommodation to physical facilities is appropriate."

The District Court gag order began by adopting *in toto* the previously voluntary Bar-Press Guidelines. The court then "clarified" the Guidelines in the following respects:

> "1. It is hereby stated that the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is 'pre-trial' publicity.
>
> "2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.
>
> "3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

> "4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.
>
> "5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assaults by the defendant will not be reported.
>
> "6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

The District Court further ordered that no photographs be taken on the third or fourth floors of the courthouse for the duration of the case, and it imposed restrictions on physical access to the third floor of the courthouse. Finally, the court provided that its order would remain in effect "until further order of the Court or until completion of this case."

On October 31, the Press Association appealed to the Nebraska Supreme Court from the District Court gag order, and moved for "immediate hearing and disposition." Simultaneously, the Press Association filed an original action for a writ of mandamus from the same court. Nothing was heard from the court until

November 4, when its Clerk advised the Association that under the court's rules "all motions must be noticed for a day certain when the court is regularly in session," and that the "next date for submission of such a matter will be Monday, December 1, 1975 . . . ."

The next day, November 5, the Press Association applied to Mr. Justice Blackmun, the Circuit Justice, for a stay of the District Court order. On November 10, the Nebraska Supreme Court issued a *per curiam* statement declining to act on the Association's appeal and petition for mandamus while the matter was pending before Mr. Justice Blackmun.

On November 13, Mr. Justice Blackmun denied the stay without prejudice to a renewed application. He pointed out that "[t]he order in question obviously imposed significant prior restraints on media reporting. It therefore comes to me 'bearing a heavy presumption against its constitutional validity.'" He added "that the very day-by-day duration of [a delay by the Nebraska Supreme Court until December 1] would constitute and aggravate a deprival of such constitutional rights, if any, that the petitioners possess and may properly assert." However, he concluded that the Nebraska Supreme Court should be given a clear opportunity to act.

On November 18, the Nebraska Supreme Court set oral argument on the Press Association's appeal and mandamus petition for November 25. That additional delay prompted the Press Association to return to Mr. Justice Blackmun with a renewed application for a stay. On November 20, Mr. Justice Blackmun decided to act. He explained why:

> "One full week has elapsed since my chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week . . . .

> "Whether the Nebraska court will reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously, at least 12 days will have elapsed, without action, since the filing of my chambers opinion, and more than four weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits."

On the merits, Mr. Justice Blackmun granted a partial stay of the District Court order. He stayed the "mandatory and wholesale imposition" of the Bar-Press Guidelines, but left the state courts free to impose particular provisions "so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of" his order. He found "[n]o persuasive justification . . . for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public . . . . These facts in themselves do not implicate a particular putative defendant." Accordingly, he stayed paragraphs 4 and 5 of the District Court order. He further stayed the order

> "[t]o the extent, if any, that [it] prohibits the reporting of the pending application to the Supreme Court of Nebraska, and to the extent, if any, that the order prohibits the reporting of the facts of the filing of my chambers opinion of November 13, or of this opinion (other than those parts of the opinions that include facts properly suppressed) . . . ."

Finally, he modified paragraph 6 of the District Court order to accord with his other modifications of the

order. The remainder of the District Court order remained in force because Mr. Justice Blackmun declined "at least on an application for a stay and at this distance, [to] impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial."

The parties then returned once again to the Nebraska Supreme Court. On November 24, the prosecutor and defendant Simants intervened in the hearing in that court. The hearing itself was held on November 25. And on December 1, after prior restraints of one sort or another had been in force for 39 days, the Nebraska Supreme Court issued its opinion and final order.

The court first decided two procedural matters. It ruled that the grant of petitioners' application to intervene in the criminal case was erroneous, and therefore it dismissed their appeal. However, the court granted permission for the filing of the original action for mandamus.

Turning to the merits, the court reasoned that it was "confronted with two separate questions. The first is the question of the jurisdiction of the court over the persons of the relators. The second is the sufficiency of the evidence to support the necessity of an order imposing some prior restraints, assuming that prior restraint in any degree is constitutional."

The court answered the first question in a curious way. Although it had held that intervention is not permissible in a criminal case and that therefore the District Court's granting of petitioners' motion to intervene had been erroneous, it held nevertheless that that erroneous grant of intervention gave the District Court

jurisdiction over the petitioners for the purpose of the gag order.[2] Indeed, the Nebraska Supreme Court expressly pointed out that the gag order "applies only to the relators." And it applies only to them because the District Court had erroneously (but effectively) asserted jurisdiction over them.

The court then turned to the "evidence" bearing on its second question. That "evidence" consisted of "the testimony of the county judge who had entered the prior order and copies of numerous news articles from newspapers printed or circulated in the county where the crime occurred." The court also took judicial notice of the population of Lincoln County and surrounding counties (to which venue might be changed under Nebraska law), and offered its own armchair evaluations of the nature and effectiveness of news coverage. On this slender basis, the court concluded that some prior restraint on the press in this case was justified.

However, the Nebraska Supreme Court found the District Court order unacceptable and therefore modified it as follows:

> "It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests [sic] made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused

[2] The striking consequence of the court's ruling is that although the District Court order bound the petitioners, and restrained their exercise of First Amendment rights, they had no right to appeal from it!

> to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings."

This is the order that is before this Court for review. It is the fourth different prior restraint to be imposed in this case.

The Nebraska Supreme Court ended its opinion by construing a Nebraska statute as permitting the conduct of preliminary hearings closed to the press and the public.

The trial of Erwin Simants began on January 5, 1976. Judge Stuart initially barred the public and the press from observing the selection of the jury. He then opened those proceedings to the public, but ruled that newsmen could enter the courtroom only if they agreed to restrictions on what could be reported. Many newsmen refused to agree, and were barred from the courtroom. On January 8, the selection of the jury was completed, the jury was sequestered, and the restrictions on the press were terminated. On January 17, Simants was convicted of first degree murder. His defense had been not guilty by reason of insanity.

SUMMARY OF ARGUMENT

I

The core of the First Amendment is its prohibition of prior restraints against the press, which derives from our firm rejection of the English system of licensing.

A system of prior restraints presents special evils. It expands the range of government control of expression. It shuts off communication before it takes place.

Suppression by a stroke of the pen is more likely to be applied than suppression through a criminal trial. The procedural protections incident to the criminal process are dispensed with. The system operates outside of public scrutiny. And its dynamics drive toward excess, as the history of all censorship shows.

This Court recognizes only one extremely limited exception to the constitutional prohibition of prior restraints—and that involves national military security. Even that exception has never been held applicable by this Court, and its application was rejected in the Pentagon Papers case.

The central question in this case is whether the Court should create a second, wholly novel, exception to the prior restraint doctrine. We submit it should not.

The cadre of censors under such a system would be trial judges and, perhaps, committing magistrates and similar officials throughout the country. They would be censoring news reporting and comment on their own performance, among other things. Moreover, the very logic of this type of censorship would require that the fact that censorship was occurring (or at least its specific nature) itself be censored.

Second, the people censored—the news media—would not be parties to any proceeding before the court.

Third, in all cases the factual predicate for issuance of the prior restraint would be armchair speculation about the imponderable impact of publicity on public opinion. That is a wholly insufficient basis for restrictions on constitutional rights.

Fourth, in gag order cases the opportunities for appellate review would be extremely limited. Any delays would magnify the abridgment of press freedom.

Fifth, while the prior restraint was in effect, the burdens of litigation would fall, not on the press alone, but also on prosecutors, defendants, and of course appellate courts. It can be expected that at least the national and metropolitan news media would litigate gag orders on appeal, to this Court if necessary. Smaller news media, which could not afford the burdens of frequent litigation, would have to acquiesce in obedient silence.

Finally, the speech at issue is not at the periphery of the First Amendment, but at its core. It is speech concerning public affairs. It is news—and the decision on whether to publish it should be made by editors, and not by judges.

Recent experience in this country demonstrates that the ultimate safeguard for the proper conduct of public affairs and the preservation of all our liberties is a public informed by the press. Secrecy at any critical stage of the criminal process will encourage abuses, and may harm rather than help the interest of defendants in fair trials.

No decision of this Court supports the imposition of prior restraints as a method for ensuring a fair trial. Prestigious committees headed by experienced judges have rejected that course.

Approval of what the Nebraska courts have done here would restrict the editorial freedom of the press, and indeed would make judges into editors. Ultimately, the affect of an affirmance in this case would be a public far less informed about the performance of the criminal justice system.

Quite apart from the fact that the gag order in this case violates the First Amendment's prohibition on prior restraints of the press, this Court has declared that the press is free to report on events that transpire in open court. The First Amendment rights at stake here are reinforced by the Sixth Amendment's provision for a public trial.

This case does not involve a "clash" between two constitutional rights. There are several alternatives to a gag order which courts can use to protect the rights of the accused. Such alternatives include change of venue; change of venire; continuance; *voir dire* examination of prospective jurors; sequestration of the jury; judicial instructions; silence orders directed at potential witnesses, parties and their lawyers; and new trials and reversals of convictions. These alternative techniques effectively protect the rights of the accused.

The decision of the Nebraska Supreme Court is fundamentally defective for failing to consider alternatives to a gag order as means to provide a trial by an impartial jury. When First Amendment rights are the issue, the government must make a clear showing that there is no less drastic means of effecting a permissible governmental purpose before the courts can even consider limiting the First Amendment rights. No such showing was made here.

II

There is also a narrow ground for reversing the order of the Nebraska Supreme Court: its scope is totally irrational, and therefore violates the Equal Protection Clause of the Fourteenth Amendment. The only characteristic that is common to the petitioners and distinguishes them from other news media is that they

attempted to litigate to protect their First Amendment interests. First Amendment rights can be restricted only by regulations or orders that are narrowly and precisely drawn so as to serve a compelling state interest by the least restrictive means. A restrictive order that encompasses all those who asserted their First Amendment rights in court is not precisely drawn. There can be no compelling interest in muzzling some Nebraska news media while leaving others free to report and comment on pre-trial proceedings.

III

Under the "capable of repetition, yet evading review" standard, immediate review of the gag order in this case is required even though the order has expired. The constitutional questions presented by this gag order are not unique to this case, for numerous other orders prohibiting press publication of information during pre-trial and trial proceedings have been issued by a variety of courts in recent years. Since gag orders directed against the press are generally applicable only during pre-trial or trial proceedings, and such proceedings seldom last for more than several months, Supreme Court review of a gag order still in effect is virtually impossible.

ARGUMENT

I. THE ORDER OF THE NEBRASKA SUPREME COURT VIOLATES THE FIRST AMENDMENT.

The interests at stake in this case are the First Amendment freedom of the press and the Sixth Amendment right of criminal defendants to a fair trial. *Amici* recognize that both rights are fundamental, and that the preservation of both is essential for the

maintenance of a democratic society under law. It is the position of *amici* that there is no necessary conflict between those two interests, and that each can be accommodated without infringement of the other. It is also the position of *amici* that the order of the Nebraska Supreme Court, providing for secrecy at a critical stage of the criminal process, does a disservice to both.

In Part A, *infra,* we show that the First Amendment bars all prior restraints on reporting on crimes and the administration of justice.

In Part B, *infra,* we show that a restraint on reporting of public judicial proceedings and information obtained therefrom violates the First and the Sixth Amendments.

In Part C, *infra,* we show that the interest in a fair trial can be adequately protected by means of devices other than direct restraints on the press, and that therefore there is no justification for imposing on the press any orders of the sort now under review. In the instant case, the Nebraska courts failed even to consider the alternative devices available to protect the defendant's interest in a fair trial.

A. The First Amendment Bars All Prior Restraints on Reporting on Crimes and the Administration of Justice.

This is the first case in which this Court has had to consider on plenary review whether to uphold a direct prior restraint on news reports and editorial comment concerning crimes and the administration of justice. It is only the third case in the history of the Court in which it has had to consider on plenary review whether to uphold a prior restraint of any sort against the pub-

lication of any kind of news or comment by the news media. The other two cases were *Near* v. *Minnesota,* 283 U.S. 697 (1931), and *New York Times Co.* v. *United States,* 403 U.S. 713 (1971). In both cases, it was noted that the almost total absence in our history of prior restraints on the news media reflects a strong conviction that such restraints are unconstitutional. See 283 U.S. at 718; 403 U.S. at 715 (Black, J. concurring).

The core of the First Amendment is its prohibition of prior restraints on the press. In *Near,* the Court pointed out that "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." 283 U.S. at 713. Since respondent seeks to have this Court uphold a bald prior restraint on the press, it is worth recalling why prior restraints have been singled out for special condemnation.

Shortly after printing was introduced in England, a system of censorship developed, under which nothing could be published except with prior approval from state or church authorities. Milton denounced the system in ringing terms:

> "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to make and license it like our broadcloth and our woolpacks. What is it but a servitude like that imposed by the Philistines, not to be allowed the sharpening of our own axes and coulters, but we must repair from all quarters to twenty licensing forges? . . . Truth is compared in Scripture to a streaming fountain; if her waters flow not in perpetual progression, they sicken into a muddy pool of conformity and tradition . . . . Lords and Commons of England, consider what Nation it is whereof ye are the governors: a Nation not slow and dull, but of a quick, ingenious and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point, the highest that human capacity can soar to . . . ." J. Milton, *Areopagitica,* in M. Hughes ed., John Milton: Complete Poetry and Major Prose, 736-37, 739, 742 (1957).

The system ended in 1695, and freedom from licensing came to be recognized as a common law right.[3] Blackstone laid down that "the liberty of the press is indeed essential to the nature of a free state," and he defined "the liberty of the press" as one which "consists in laying no previous restraints upon publication." 4 Blackstone, Commentaries **151-52.[4]

In America, the English prohibition against administrative licensing was broadened into a general protection of the freedom of the press in the First Amendment.[5] But the condemnation of prior restraints remained central. *See Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907). Only last Term, the Court, *per* Mr. Justice Blackmun, observed: "Our distaste for censor-

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[3] T. Emerson, The System of Freedom of Expression 504 (1970).

[4] "The criticism upon Blackstone's statement has not been because immunity from previous restaint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and Federal constitutions." *Near* v. *Minnesota, supra,* at 714-15.

[5] *See* Madison's *Report on the Virginia Resolutions* in 4 Elliot's Debates 569-70 (2d ed. 1836).

ship—reflecting the natural distaste of a free people—is deep-written in our law." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 553 (1975).

The reasons for singling out prior restraints for special condemnation have been summarized by Professor Emerson:

> "A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." [6]

Of course, in theory the constitutional prohibition of prior restraints has not been total. In a dictum in *Near* the Court identified three categories of exceptions. The first is the protection of national military security:

> "'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. *Schenck* v. *United States,* 249 U.S. 47, 52 [1919]. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." 283 U.S. at 716.

[6] T. Emerson, The System of Freedom of Expression, 506 (1970).

Second, "the primary requirements of decency may be enforced against obscene publications." *Id.* Third, "[t]he security of the community may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that have all the effect of force . . . .'" *Id.*

In the 43 years since *Near* was decided, those three categories have not been expanded. *See Southeastern Promotions, Ltd.* v. *Conrad, supra* at 559. Indeed, they have been reduced, or put on a different footing. Obscenity, it is now recognized, does not present an exception to the prior restraint doctrine. It is wholly outside constitutional protection. *Miller* v. *California,* 413 U.S. 15 (1973); *Roth* v. *United States,* 354 U.S. 476, 481 (1957). Even in dealing with licensing of arguably obscene motion pictures, the Court has not held that there is a blanket exemption from the prior restraint doctrine, but rather that systems of review must adhere to strict procedural standards so as to "obviate the dangers of a censorship system." *Freedman* v. *Maryland,* 380 U.S. 51 (1965). Similarly, speech that has the effect of force is not "speech" in the constitutional sense at all, and thus is not entitled to First Amendment protection. *E.g., Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

In sum, this Court's cases "have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restrain may be overridden"—and that class consists of the kind of military security examples given in *Near*: obstruction of recruitment, sailing dates of transports, the number and location of troops. *New York Times Co.* v. *United*

States, supra, at 726 (Brennan, J. concurring). And even that exception was held inapplicable in *New York Times Co.* v. *United States, supra,* and in fact has never been applied by this Court in any case.

The question presented in this case is whether a second, wholly novel, exception to the prior restraint doctrine should be created to apply to the reporting of crimes and the administration of criminal justice. We submit that no such exception should be created. There is an "extraordinary protection against prior restraints enjoyed by the press under our constitutional system." *New York Times Co.* v. *United States, supra,* at 730-31 (White, J. concurring).[7] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co.* v. *United States, supra,* at 714; *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Bantom Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963). That presumption cannot be overridden in this category of cases.

[7] "According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. [Citation.] A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. [Citation.] We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Miami Herald Pub. Co.* v. *Tornillo,* 418 U.S. 241, 259 (1974) (White, J., concurring) (footnote omitted).

A system of prior restraints on news reports and comment about criminal cases would have many dangerous features. It is worth considering the sober realities of such a system.

First, the cadre of censors would be state (and federal?) trial judges and, perhaps, committing magistrates and similar officials across the length and breadth of this country. Into their hands would be entrusted the power to tell newspapers, magazines, radio and television stations, and other news media what not to publish. And they could exercise that power with the mere stroke of a pen. These officials, of course, are among those whose performance of official duties would be reported and commented upon in the publications to be censored. Thus, to the normal excesses of censors, testified to by history, must be added in this kind of case the probability of further abuses resulting from the natural instinct for self-protection.[8] That instinct would have ample room for application because, as the present case illustrates, the logic of this kind of censorship requires that the fact that the censorship is occurring (or, at least, its specific nature) itself be censored. Judges and magistrates across the country would not only be censoring press reporting about criminal cases, but also press reporting about judicial censorship of the press.

Second, the people censored—the news media—would not be parties to any proceeding before the

[8] "Judges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of the judicial process, others might exercise it to prevent proper criticism of their own administration of office." S. Rifkind, *When the Press Collides with Justice,* in Selected Essays on Constitutional Law 651, 653 (1963).

court. In the instant case the petitioners became parties only through what the Nebraska Supreme Court found was an erroneous grant of a motion to intervene. That error presumably will not be repeated in the future. Even if some procedure could be devised for the court to assert jurisdiction over local media, there is no practical way for national media to be brought before a local criminal court every time a gag order was under contemplation. In the instant case, the restraint applies —illogically, ineffectively, and discriminatorily—only to local media who happened to intervene. Any really effective prior restraint would have to encompass national news media distributed in the locale of the court, and therefore necessarily would have to bind non-parties. Thus, this system of prior restraint would involve, *as a general feature*, severe restrictions on the First Amendment rights of parties not before the court, not able to be heard on the facts or the law, and having no right to seek appellate review except by extraordinary writ.

Third, in all cases the factual predicate for issuance of the prior restraint would be armchair speculation about the imponderable impact of publicity on public opinion. There would be no genuine evidence in such cases, as there is none in the instant case. Under whatever legal standard might be used (*e.g.*, "clear and present danger to the administration of justice," "reasonable likelihood of prejudice," etc.), the trial judge would have to predict what the press would publish, the tone and flavor of the publications, their frequency and prominence, and their impact on their audiences (in light of the constitutional standard for an "impartial" jury).[9] These calculations pile speculation upon

[9] See pp. 42-45, *infra*.

speculation. There simply is no way that a court (particularly, in the brief time available to it) could make, in an empirical and reliable way, the predictions that would be required. "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co.* v. *United States, supra,* at 725 (Brennan, J. concurring). The same principle was followed in *Healy* v. *James,* 408 U.S. 169 (1972) (Powell, J.).[10] Yet surmise and conjecture are the only bases on which restraints could be imposed in the fair trial-free press context. The instant case is a perfect example of that fact.

Fourth, as the history of gag order cases has shown,[11] the opportunities for appellate review would be very limited. Review would come only after the prior restraint had gone into effect and was operating as a continuing abridgment of the right to publish. Since the news media would not be parties to any formal proceeding, review would be sought by original writ or stay application, and the special burdens on those who invoke those procedures would apply. Preparations by counsel and the deliberations of the reviewing court or courts would be greatly expedited, with an unavoidable adverse impact on the quality of the ultimate decision.[12] Throughout the days, weeks or months re-

[10] *See also Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969): "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."

[11] *See, e.g., Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U.S. 1301 (1974) (Powell, J., in chambers), *dismissed as moot,* 420 U.S. 985 (1975); *Newspapers, Inc.* v. *Blackwell,* 421 U.S. 997 (1975) (stay denied).

[12] *See New York Times Co.* v. *United States, supra,* at 748-49, 751 (Burger, C.J., dissenting), 752-55 (Harlan, J., dissenting).

quired for even expedited appellate review, the censorship order of the trial judge would stay in force unexamined. All delays would magnify the abridgment of press freedom, as the delays of the Nebraska Supreme Court did in this case. Finally, it can be expected that unhurried plenary review would not occur in more than a tiny percentage of cases—because many would become moot, or because the current news value would go out of the case and the media could not therefore justify further counsel fees.

Fifth, while the prior restraint was in effect, the burdens of litigation would fall, not only on the press alone, but also on prosecutors, defendants, and, of course, appellate courts. For a time at least, all would be caught up in the rush of papers which a gag order case generates. The instant case, again, is illustrative. Within a period of about one month, this case went from the County Court to the District Court, to the Nebraska Supreme Court, then to Mr. Justice Blackmun at this Court, then back to the Nebraska Supreme Court, then back to Mr. Justice Blackmun, and then back again to the Nebraska Supreme Court; and eventually it has come back again to this Court. During this time, the prosecution and defense counsel were distracted from what must be their central concern—the criminal trial itself; the Attorney General of Nebraska was required to enter the case to represent the District Judge; counsel for the press had to shepherd the case from one court to another; and the schedules of both the Nebraska Supreme Court and this Court had to be disrupted by emergency applications. Perhaps this case is exceptional since the parties are urgently seeking a definitive decision from this Court. But it can confidently be expected that at least the

national and metropolitan press will not accept trial court gag orders untested, that cases of this type will in many cases generate some appellate litigation while the gag is in effect, that that litigation will necessarily be conducted on an emergency basis, and that stay applications to this Court will become routine, if not universal. It is no accident that within the last two years, this Court has received three emergency stay applications in gag order cases: *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974); *Newspapers, Inc.* v. *Blackwell*, 421 U.S. 997 (1975); and the instant case. If this Court gives the green light to the proposed system of prior restraints, those cases will be portents for the future.

H. Brandt Ayers, editor and publisher of *The Anniston* (Ala.) *Star* (circulation 28,000), one of these *amici*, has described in a letter to counsel the impact that the proposed system of prior restraints would have on small, independent, local newspapers such as his:

> "Small town dailies would be the unknown, unseen and friendless victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published.
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> "Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend

ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided.

"Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners."

Finally, the material that would be suppressed by such orders is material of high public importance. We deal here not with obscenity, not with words that amount to force. We are not at the periphery of the First Amendment, but at its heart. We deal here with news reporting and editorial comment concerning crimes and the administration of justice by public officials. This is speech "concerning public affairs"; therefore, it "is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). In *Sheppard* v. *Maxwell*, 384 U.S. 33, 349-50 (1966), the Court reaffirmed the importance of this kind of speech. *See also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975) (White, J.).

The material that would be suppressed is also news. The prior restraint, therefore, would hit most sharply at the daily press and its audiences. The primary function of the daily press is to report events of public interest when they occur, and not at some later time. If a judge (or any other government official) can prohibit or even delay the reporting of news, that function is destroyed. Delay in these circumstances can amount to total censorship.

Recent experience in this country demonstrates the wisdom of Mr. Justice Brandeis' observation that "sunlight is the most powerful of all disinfectants."[13] Whether the subject matter be the conduct of a war, the conduct of the Presidency, the activities of law enforcement officers, or the performance of criminal court judges, the ultimate safeguard of the public interest is a promptly informed public. It is public opinion, informed by a free press, that is the ultimate protection of all our liberties against encroachment from any source—foreign or domestic, state or federal, legislative, executive, judicial, or private. Without conjuring up a parade of horribles, we can fairly expect that if the shroud of secrecy descends over pre-trial proceedings, or any other stage of the criminal process, abuses will occur, and that secrecy (though sought by the accused in this case) will not necessarily promote fair trials or the interests of defendants.[14]

The fact that the restraint will be lifted at some future time is not a sufficient answer. By the time the facts come out, public attention may have moved on to other matters, or it may be too late to repair the damage.

None of this Court's prior decisions provides any support for the imposition of direct restraints on the press in the context of criminal cases. Contempt con-

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[13] Quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 308 (1964) (Goldberg, J., concurring).

[14] The secrecy of the Star Chamber has not generally been regarded as a safeguard of fair trials.

victions for press reporting of judicial proceedings (albeit non-jury cases) were overturned in *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). Even in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and *Estes* v. *Texas*, 381 U.S. 532 (1965), where opportunities were clearly presented, the Court carefully refrained from giving any encouragement to the imposition of direct restraining on the press.[15]

The foregoing analysis of the dangers inherent in any system of prior restraints on press reporting of criminal cases is strongly reinforced by the conclusions of prestigious committees that have studied the free press-fair trial problem. The American Bar free press fair trial problem. The American Bar Association's Advisory Committee on Fair Trial and Free Press, headed by Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts;[16] a

[15] A half sentence in the lengthy opinion in *Branzburg* v. *Hayes*, 408 U.S. 665, 685 (1972), speculates on the possibility of enjoining reporters from publishing information about trials "if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." No such showing of necessity exists in the present record, of course; and the only support offered for the dictum was *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and similar cases, in which this Court pointedly omitted restrictions on the press from its list of methods available to judges to preserve fair trial procedures, and said "of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." 384 U.S. at 362-63. *Branzburg* noted specifically that "these cases involve . . . no prior restraint or restriction on what the press may publish." 408 U.S. at 681. And there is no indication that the Court intended its passing comment to authorize any restrictions on pretrial publications.

[16] American Bar Association, Standards Relating to Fair Trial and Free Press (tentative Draft of December 1966 and Supplement of March 1968) 68-73 (1968), *but cf.* Approved Draft 27.

Special Committee of the Association of the Bar of the City of New York headed by Judge Harold R. Medina of the Second Circuit;[17] and the Judicial Conference's Committee on the Operation of the Jury System, headed by Judge Irving Kaufman of the Sec-

[17] The Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations 10-11 (1967): "In sum, our conclusion is that constitutional guarantees would stand in the way of most efforts to regulate the relationship between trials and the media, whether by legislation or by use of the contempt power. And perhaps this is as it should be, for such efforts would embroil the courts in constant conflicts between the courts and the media, which would naturally resist official efforts to restrict their freedom. Such conflicts would not serve to improve the administration of justice but would only estrange those whose common interest should be improvement. This would result in many criminal cases, which are now adversary proceedings between the state and the defendant, also becoming adversary proceedings between the courts and the media, and we cannot believe that this would advance the public interest. Accordingly, because we believe that as a matter of both constitutional law and policy, an approach through legislation or extension of the contempt power is neither feasible nor wise, our recommendations proceed along other lines." With respect to gag orders, the committee observed: "That such orders could be used to cover up incompetence, venality, and a deliberate but covert desire to impede or frustrate criminal procedures against guilty politicians or those involved in racial disputes and other violence seems to us to be apparent on the face of the matter." *Id.*, 44. "The prospect, in this pretrial period, of judges of various criminal courts of high and low degree sitting as petty tyrants, handing down sentences of fine and imprisonment for contempt of court against lawyers, policemen and reporters and editors, is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what price!" *Id.* 39.

ond Circuit,[18] all firmly rejected any system of prior restraints on the press.

The immediate impact of a system of prior restraints would be on the editorial freedom of the press. One cannot read the various orders entered below by the County Court, the District Court, and the Supreme Court of Nebraska without recognizing that those courts had assumed to themselves the editorship of the affected news media. Those judges were deciding, paragraph by paragraph, what could appear and what could not appear in the daily press. One judge would have blue penciled a description of the crimes; another would have let that stay. One judge would have edited out the testimony of a pathologist; another would have left it in. And so it went, as the case progressed from one court of editors to another. The entire process is offensive to the First Amendment. As Mr. Justice Stewart has expressed it, the First Amendment "gives *every* newspaper the liberty to print what it chooses, free from the intrusive editorial thumb of Government." *CBS* v. *Democratic National Committee*, 412 U.S. 94, 145 (1973) (concurring opinion) (emphasis in original). In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973), the Court, *per* Mr. Justice Powell, explained:

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[18] Committee on the Operation of the Jury System, Report on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 401-02 (1968): "The Committee does not presently recommend any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems."

> "Nor *a fortiori,* does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by the Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

See also 413 U.S., at 393-97 (Burger, C.J., dissenting); 413 U.S., at 400 (Stewart, J., joined by Douglas, J., and expressing the view of Blackmun, J., dissenting) ("[The] question . . . is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power.").[19] Similarly, in *Cohen* v. *California*, 403 U.S. 15, 24 (1971), the Court, *per* Mr. Justice Harlan, stated:

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

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[19] This passage was quoted approvingly by Mr. Chief Justice Burger, speaking for the Court, in *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 255-56 (1974).

Most recently, in *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974), the Court, *per* Mr. Chief Justice Burger, pointed out:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

The ultimate impact of the system of prior restraints would be on the public. It would be deprived of current information on the progress of criminal cases. It would be able to appraise the performance of judges and other criminal justice officials only after a lag, if at all. Mr. Justice Brandeis warned that "the greatest menace to freedom is an inert people." *Whitney* v. *California*, 274 U.S. 352, 375 (1927) (dissenting opinion). Approval of prior restraints on public information about criminal cases would be an unprecedented step toward making our people incapable of commenting on governmental actions.

B. A Restraint on Reporting of Public Judicial Proceedings and Information Obtained Therefrom Violates the First and Sixth Amendments.

The order of the Supreme Court of Nebraska restricts publication of information concerning "confessions or admissions against interest" by the defendant, and "other information strongly implicative of the accused as the perpetrator of the slayings," whether or not such information was obtained as a

result of attendance at the preliminary hearing. That preliminary hearing was open to the public and was attended by some representatives of the press. Information within the ban of the order was made public there, and the existence of other such information may have become known therefrom.

Quite apart from the First Amendment's prohibition on prior restraints of the press, this Court has emphatically declared—and in the very context of criminal trials of great public interest—that "of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard* v. *Maxwell*, 384 U.S 333, 362-63 (1966). "What transpires in the courtroom is public property." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947).

> "[R]eporters of all media . . . are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges* v. *California*, 314 U.S. 252 (1941), and *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), which we reaffirm." *Estes* v. *Texas*, 381 U.S. 532, 541-42 (1965).

Last Term in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court reiterated that the press is free to publish information from public court proceedings and be free not only from prior restraints, but also from subsequent actions for damages. The Court stated, per Mr. Justice White:

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the pro-

> ceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." 420 U.S. at 491-92.

This analysis illustrates how the First Amendment rights at stake here are reinforced by the Sixth Amendment's provision for a "public trial." Under our Constitution, the criminal justice process is not conducted in secret. *In re Oliver*, 333 U.S. 257 (1948). "Public trial is essentially a right of the accused . . . . There is, however, a correlative right to preserve the public's right to be informed about criminal prosecutions in the best interests of all its citizens." *United States ex rel. Mayberry* v. *Yeager*, 321 F. Supp. 199, 204 (D.N.J. 1971). In simpler, less populous times, the constitutional interest in "public" trials could be adequately served simply by holding trials in rooms with unlocked doors. Today, however, as the Court in *Cox* pointed out, citizens do not have time or opportunity to attend government functions generally, and they rely on the press for reports on what transpired. That is as true of the proceedings on the murder charges in the instant case as it was of the proceedings on the murder charges in *Cox*.

C. The Order of the Nebraska Supreme Court Is Unconstitutional Because Less Drastic Alternatives Than a Direct Restraint on the Press Would Have Protected the Rights of the Accused and Because the Nebraska Court Failed To Consider Such Alternatives.

The analysis underlying the Nebraska Supreme Court's order is fundamentally defective. The court viewed this case as involving a direct substantive "clash" between two constitutional rights, "the rights which are guaranteed by the First Amendment to the Constitution and the right to an impartial jury guaranteed by the Sixth Amendment . . . ." Cert. Pet'n Appendix 52a, 61a. But in determining that the press should be gagged in the instant case, the Nebraska Supreme Court failed to follow a fundamental rule of constitutional law:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of governmental abridgement must be viewed in light of the less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

See also, Gooding v. *Wilson*, 405 U.S. 518, 522 (1972); *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968) (applying principle to court orders affecting First Amendment rights); *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940).[20] As it

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[20] *See generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

rushed to impose a precedent-shattering direct prior restraint on the press, the Nebraska Supreme Court did not even consider the applicability of the many alternatives to a gag order which courts can use to protect the rights of the accused. As the decisions of this Court demonstrate, such alternatives will safeguard an accused, even when widespread publicity has attended the criminal process from arrest through trial. For this reason, too, the Nebraska Supreme Court's order is invalid.

1. The Right to an Impartial Jury.

The Sixth and Fourteenth Amendments guarantee to an accused the right to trial "by an impartial jury." In *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961), this Court explained the meaning of that constitutional phrase.[21] The Court stated that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," and a juror's verdict must be based upon "evidence developed at trial." But the Court also noted that

> "*It is not required, however, that the jurors be totally ignorant of the facts and issues involved.* In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity and *scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.* This is particularly true of criminal cases. *To hold*

[21] Although this Court has not expressly incorporated the Sixth Amendment's "impartial jury" requirement into the Fourteenth Amendment's due process clause, the "due process" requirement of the latter amendment appears to be indistinguishable from the Sixth Amendment guarantee. *See, Irvin* v. *Dowd, supra.*

> *that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.* It is sufficient if the juror can lay aside his impression or opinion and render a verdict on the evidence presented in court." *Id.* (Emphasis supplied.)

See also, In re Oliver, 333 U.S. 257 (1948); *In re Murchison,* 349 U.S. 133, 136 (1955); *Reynolds* v. *United States,* 98 U.S. 145, 155 (1879).[22] Cf. *Peters* v. *Kiff,* 401 U.S. 453 (1972). Thus, this Court has cautioned that, when assessing the prejudicial impact of publicity, courts must "distinguish between mere [jurors'] familiarity with [a defendant] or his past and an actual predisposition against him" and between "largely factual publicity [and] that which is invidious or inflammatory." *Murphy* v. *Florida,* 421 U.S. 794, 800, n.4 (1975). *See also, Beck* v. *Washington,* 369 U.S. 541, 556 (1962).[23]

To be sure, *in a few, extreme instances,* this Court, in reviewing a conviction after trial, has presumed prejudice on the part of the jury because of the extraordinary circumstances presented on the record.

[22] *See generally, United States* v. *Wood,* 299 U.S. 123, 145-46 (1936); *United States* v. *Burr,* 25 Fed. Cas. 49, 51 (C.C.Va. 1807); Comment, *The Impartial Jury—Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial,* 51 Cornell L.Q. 306 (1966).

[23] The Nebraska Supreme Court made no finding that the press coverage of Simant's arrest and subsequent events "was or is even likely to be anything like that referred to in *Sheppard* v. *Maxwell,*" i.e. inflammatory and invidious. Cert. Pet'n Appendix 62a. *See, Sheppard* v. *Maxwell, supra,* 384 U.S. at 361 ("inflammatory publicity" based on misinformation, rumor and accusation occurred after Sheppard's indictment).

Rideau v. *Louisiana*, 373 U.S. 723 (1963); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). But two of these cases, *Estes* and *Sheppard*, turned on highly unusual situations arising at trial.[24] And convictions were reversed on that basis. Only *Rideau* was concerned solely with pretrial publicity; and that case involved a twenty minute film of the accused's "confession," which was broadcast three times by a television station in the community where the crime and the trial took place. Moreover, the *voir dire* in *Rideau* demonstrated that the jury selected was actually infected with bias. *See* 373 U.S. at 725-26. As this Court has recently observed, *Estes, Sheppard* and *Rideau* "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprive the defendant" of his right to trial by an impartial jury. *Murphy* v. *Florida, supra*, 421 U.S. at 729.

With respect to virtually all claims that a conviction should be overturned because publicity has had a prejudicial impact on the jury, therefore, the "burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and [must] be sustained not only as a matter of speculation but as a demonstrable reality."

[24] As this Court said in *Murphy* v. *Florida, supra*, 421 U.S. at 799, when explaining the cases in which prejudice was presumed: "The *trial* in *Estes* had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, *Sheppard* arose from a *trial* infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival." (Emphasis supplied.)

United States v. *Handy*, 351 U.S. 454, 462 (1956), quoting from *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

2. Devices for Avoiding a Direct Conflict Between the Press' Constitutional Right to Publish and the Accused's Constitutional Right to Trial by an Impartial Jury.

A number of techniques exist for reducing the possible prejudice to a criminal defendant from widespread publicity. *See generally*, American Bar Association, Standards Relating to Fair Trial and Free Press 73-74 (Approved Draft 1968). These procedural safeguards are mediating devices which can be utilized to avoid a direct substantive conflict between the constitutional rights of the press and the constitutional rights of the accused. *See also*, Note, *Community Hostility and the Right to an Impartial Jury*, 60 Colum.L.Rev. 349 (1960).

This Court has emphasized that there "are many ways to assure the kind of impartial jury that the Fourteenth Amendment guarantees." *Groppi* v. *Wisconsin*, 400 U.S. 505, 509 (1971). As the Court said in *Sheppard* v. *Maxwell, supra*, 384 U.S. at 358, "Since he viewed the news media as his target, the judge never considered *other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial* . . . ." (Emphasis supplied.) And as Mr. Justice Powell observed in granting a stay of a Louisiana court order limiting reporting of a trial, "the court has available alternative means for protecting the defendants' rights to a fair trial." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1308 (1974). (Citations omitted.)

The mediating devices which courts have employed on numerous occasions include the following:

(a) Obviously, a *change of venue* may protect against jury prejudice. *Irvin* v. *Dowd, supra; Sheppard* v. *Maxwell, supra,* 384 U.S. at 363; Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury,* 42 Notre Dame Law. 925 (1967).

(b) Similarly, a *change of venire* may be used to ensure impartiality. Note, *Community Hostility and The Right to an Impartial Jury,* 60 Colum.L.Rev. 349, 365-67 (1960).

(c) A *continuance* may reduce the dangers of pretrial publicity. *Sheppard* v. *Maxwell, supra;* A. Friendly & R. Goldfarb, Crime and Publicity 96-101 (1967). *Cf. Murphy* v. *Florida, supra,* 421 U.S. at 796.

(d) The *voir dire* examination of prospective jurors is also a powerful tool for counteracting the effects of publicity. *Murphy* v. *Florida, supra,* 421 U.S. at 800-03; Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan.L.Rev. 545 (1975). If necessary, the *voir dire* can be conducted with individual jurors to provide even greater protection. *See,* American Bar Association, Standards Relating to Fair Trial and Free Press § 3.4 (Approved Draft 1968); Brief of the United States at 64, *United States* v. *Mitchell, et al.,* Crim. No. 75-1381 (D.C. Cir.) (appeal pending).[25]

(e) *Sequestration* of the jury can also be utilized to avoid prejudice. *Sheppard* v. *Maxwell, supra; Holt* v. *United States,* 218 U.S. 245, 250 (1910). *See,* Comment, *Sequestration: A Possible Solution to the Free Press-Fair Trial Dilemma,* 23 Am.U.L.Rev. 923 (1974).

[25] *See also, Calley* v. *Callaway,* 519 F.2d 184, 209 (5th Cir. 1975) (voir dire in trial of Lieutenant Calley ensured fair trial despite extensive pretrial publicity).

(f) *Judicial instructions* may ensure impartiality. A. Friendly & R. Goldfarb, Crime and Publicity 106-09 (1967).

(g) *Silence orders* directed at potential witnesses, parties and their lawyers may also protect the rights of the accused. *Sheppard* v. *Maxwell, supra; Calley* v. *Callaway,* 519 F.2d 184, 212-213 (5th Cir. 1975).

(h) As noted, the *burden of proof* is on the accused to show, as a matter of demonstrable reality, that publicity will have a prejudicial impact on the jury of his peers. See pp. 44-45, *supra.* This procedural requirement, too, mediates between the rights of the accused and the rights of the press.

(i) Finally, *new trials* and *reversals,* though hardly desirable, are always possible if, after careful scrutiny of the complete record of the proceedings and upon mature reflection, a court determines that trial by an impartial jury was denied an accused. *Sheppard* v. *Maxwell, supra,* 384 U.S. at 363 ("If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.").

Of course, these various mediating devices may be used in combination to ensure that the accused receives a trial by an impartial jury.

3. The Nebraska Supreme Court Failed to Consider Alternatives to the Gag Order on the Press.

The mediating devices listed above constitute important techniques for avoiding an ultimate substantive choice between the free press and fair trial values. They are classic "less drastic means" which can be employed to protect legitimate governmental interests and which do not involve a direct abridgment of the rights guaranteed the press under the First and Fourteenth Amendments. And, as noted, the "less drastic means" principle has been consistently utilized by this Court in the First Amendment area in order to reconcile important values in conflict.[26] *Shelton* v. *Tucker, supra; Carroll* v. *President & Commissioners of Princess Anne, supra; Sherbert* v. *Werner,* 374 U.S. 398, 407 (1963). *See also, Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1971).

When First Amendment rights are at issue, government must make a *clear showing* that there is no less drastic means of effecting a permissible governmental purpose before the courts can even consider which of the two competing values should prevail. This rule has been stated by the American Bar Association, Standards Relating to Fair Trial and Free Press 69-70 (Approved Draft 1968): neither direct

[26] Although the principle has been used in many different contexts, the core idea has been summarized as follows:

> ". . . the Court has usually limited its survey of less drastic measures to 'traditional legal methods' and assumed, on the basis of society's long experience with them, that these methods would be reasonably effective, practical and inoffensive ways by which the state could accomplish the ends it claimed to seek." Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464, 472 (1969).

This case, thus, is at the core of the principle, since the alternatives to gagging the press are "traditional legal methods."

restrictions nor use of the contempt power against the press in the criminal trial context should even be considered, as a matter both of sound policy and constitutional law, "in the absence of the *clearest showing that less drastic measures will not achieve the objective.*" (Emphasis supplied.)[27]

In the instant case, the Nebraska Supreme Court did not make a clear showing that less drastic means than a gag order on the press would accomplish the goal of ensuring that the accused was afforded trial by an impartial jury. It did not explore the mediating devices that were available to reduce the effects of pretrial publicity. Indeed, *it did not consider the question at all.*[28]

In sum, eager to resolve a supposed clash between conflicting constitutional values, the high court of Nebraska did not pause to consider the critical threshold question of whether this "clash" could be

[27] As noted, of course, neither the ABA Standards, nor other recommendations from bar and bench, *see,* pp. 34-36, *supra,* approve direct restraints on the press.

> ". . . the Committee does not believe that the present resolution of the problem confronting us lies in direct restrictions on the media. Particularly during the pretrial or post-trial periods, the imposition of restrictions might stifle discussion of important public issues and discourage needed criticism of offical conduct." American Bar Association, Standards Relating to Fair Trial and Free Press at 151 (Approved Draft 1968).

See also, American Bar Association Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Revised Draft, November, 1975) (". . . the Committee specifically recommends against the issuance of any orders which would impose direct restraints on the press.")

[28] Nor did the Nebraska District Court even consider the question of whether alternatives to direct restraints on the press would protect the rights of the accused. Cert. Pet'n Appendix 9a-12a.

avoided.[29] This failure to consider less drastic means is enough to condemn the Nebraska Supreme Court's order.[30]

4. The Alternative Techniques for Protecting the Rights of the Accused are Effective.

Given the compelling reasons for not allowing prior restraints on press coverage of criminal proceedings, *see* pp. 21-38, *supra*, and given the efficacious alternative techniques available for protecting the rights of the accused, this Court should rule that trial courts shall not impose direct restraints on the press in this context, but should, instead, make use of the established alternatives. *See*, H. Simons & J. Califano, The Media and The Law 9 (1976). In so holding, this Court would only be reaffirming the sound constitutional approach for dealing with the "free press-fair trial" issue that it has established in its previous cases, especially, *Rideau* v. *Louisiana, supra, Sheppard* v. *Maxwell, supra,* and *Murphy* v. *Florida, supra.*

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[29] In somewhat cryptic fashion, the Supreme Court of Nebraska mentions that state law provides for a change of venue to an adjacent county and for trial of an accused within six months from the date charges were filed. But the court does not explicitly consider, let alone hold, that a change of venue or a continuance would not protect the rights of the accused. *See* pp. 55-57, *infra.*

[30] "In the *Sheppard* case and elsewhere, the Supreme Court chided lower courts for failure to use these [alternative] techniques. There are countless other cases, sensational and routine, where the same charge is deserved . . .

"Far too frequently, the fault is not the lack of filtering procedures [i.e. alternative techniques], but the failure to apply them. As Justice Clark made clear, they must be brought into play much more carefully and earnestly. Until they are, the Supreme Court has indicated that it will not consider—nor should it—the more drastic measures against the press that some critical members of the legal profession demand."

A. Friendly & R. Goldfarb, Crime and Publicity 248-49 (1967).

In *Rideau,* this Court dealt with pretrial publicity arising out of the televised confession of the accused. The trial court denied Rideau's motion for change of venue, despite the fact that his "confession" to bank robbery, kidnapping and murder had been broadcast three times in the community of 150,000 and had been viewed by tens of thousands of people. 373 U.S. at 724-25. This Court reversed the conviction, holding that "it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later charged." *Id.,* at 726. Although this Court did not face the issue directly, the clear implication of *Rideau* is that a change of venue in such circumstances—which were similar to, but more extreme than, the circumstances in this case—would have protected the right of the accused to trial by an impartial jury.

In *Sheppard,* defendant was the subject of "massive, pervasive and prejudicial publicity that attended his prosecution." 384 U.S. at 335. Not only was there unusual pretrial publicity, including a televised three-day inquest conducted before several hundred spectators in a gymnasium, but at trial the press occupied substantial space within the bar and caused continual disruptions by movement within the courtroom. The unsequestered jury had direct access to news stories. *Id.* This Court criticized the "deluge of publicity" which reached at least some of the jury, *id.* at 357, and deplored the "bedlam" that "reigned at the courthouse during the trial," *id.,* at 355. Yet *despite these excesses,* this Court concluded that it would remain "unwilling to place any direct limitations on the freedom tradi-

tionally exercised by the news media," *id.* at 350, and that the alternative procedures, adumbrated above, "would have been sufficient to guarantee Sheppard a fair trial . . . .," *id.*, at 358. Thus, even in one of the most extreme cases of prejudicial publicity in this Nation's history, this Court ruled that alternative procedures for protecting the rights of the accused should be utilized by trial courts, that such alternative procedures would be effective and that the imposition of direct restraints on the press' ability to cover criminal proceedings should be avoided.[31]

Last Term in *Murphy* v. *Florida*, this Court again had occasion to consider the fairness of a trial attended by substantial publicity. And again it concluded that the alternative techniques—in this instance *voir dire*—could assure that a highly-publicized accused would have a trial by an impartial jury. Murphy's arrest for robbery, and subsequent judicial proceedings in the case, received wide news coverage because he had been involved in a notorious jewel theft several years before and because before his trial date on the robbery charges he was indicted for murder. 421 U.S. at 795-6. The events surrounding Murphy's robbery charge thus "drew extensive press coverage . . . [and the] record in this case contains scores of articles reporting on [Murphy's] trials and tribulations . . ." *Id.* Again, despite this pervasive publicity, this Court ruled that *voir dire* was an adequate safeguard to insulate the accused from the publicity which had been prevalent

[31] The Supreme Court of Nebraska wholly misreads *Sheppard*. Cert. Pet'n Appendix 61a-65a. The Nebraska high court totally ignores the various alternatives suggested in *Sheppard* for protecting an accused and then draws the completely unwarranted inference from the case that this Court has sanctioned direct, prior restraints on the press.

in the community less than eight months before the jury was selected in the robbery case. *Id.* at 802-3. And again, this Court did not give even the slightest intimation that a proper remedy in such a case would have been to gag the press. Indeed, by emphasizing the utility of the *voir dire*, this Court indicated how widespread publicity could be accommodated by the criminal process.

The efficacy of the mediating devices has been further underscored by lower federal court holdings in recent trials that have engendered enormous publicity —the prosecution of Lieutenant Calley for the events at My Lai, *Calley* v. *Callaway, supra,* and the prosecution of high government officials for crimes uncovered during the "Watergate" investigations. *See, e.g., United States* v. *Liddy,* 509 F.2d 428 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 911 (1975); *United States* v. *Chapin,* 515 F.2d 1274 (1975), *petition for cert. filed,* 44 U.S.L.W. 3150 (U.S. September 12, 1975) (No. 75-401); *United States* v. *Mitchell,* 389 F. Supp. 917 (D.D.C. 1975), *appeal pending* (D.C. Cir. No. 75-1381). In each of these cases, which, of course, were the subjects of overwhelming public attention, the courts found that the mediating devices could accommodate the press' constitutional right to publish and the accused's constitutional right to trial by an impartial jury. For example, in *Calley,* the Court of Appeals for the Fifth Circuit directed its "focus" to the "post-indictment, pretrial publicity and its impact on [Calley's] trial." 519 F.2d at 205. In finding that there was no prejudice to the accused from the massive pretrial publicity, the Fifth Circuit stated:

> "It is not disputed that the military court used most of the means suggested by *Sheppard* v. *Max-*

> *well* to ameliorate potential prejudice stemming from publicity. The court delayed the proceedings to allow publicity to abate, it allowed extensive voir dire examination to probe for any possible influence on court members by the publicity. The court successfully took great pains to insure that no publicity reached the court members during the trial." *Id.*, at 212.

The Court of Appeals also upheld the military court's decision *not* to restrain the press, in the period before the trial, from publishing statements of witnesses or descriptions of the events at My Lai hamlet: "The military court should not be criticized for refusing to do what was in all probability constitutionally impermissible—controlling or imposing prior restraints on the news media." *Id.* at 213.[32]

In the instant case, the alternatives to a direct restraint on the press would have been equally effective. Put another way, there is no evidence on the record

[32] In *United States* v. *Liddy, supra*, the Court of Appeals for the District of Columbia Circuit ruled that the trial court did not abuse its discretion in declining the defendants' request that all veniremen who had heard anything about the case be examined individually. The trial court had directed general questions to the entire array, followed by individual questioning of those who responded affirmatively to initial inquiries. 509 F.2d at 436.

In *United States* v. *Chapin*, a similar *voir dire* was approved. 515 F.2d at 1287. The Court of Appeals upheld the trial court's denial of the accused's motion for change of venue. In both these highly publicized cases, therefore, the trial court did not have to use other techniques available (completely individual voir dire; change of venue) which would have further assured defendants trial by an impartial jury in the face of widespread news coverage.

See also, United States v. *Mitchell, supra*, 389 F. Supp. at 920 (trial court deferred consideration of defendants' motions regarding pretrial publicity until *after* the *voir dire* and subsequently concluded that "exhaustive" *voir dire* examination and a continuance assured the accused of a fair trial.)

before this Court that the alternative techniques would not have been effective. To be sure, the press was barred from printing "confessions or admissions against interest" made by the accused to third parties or law enforcement officials and other "information strongly implicative" of guilt. Cert. Pet'n Appendix 64a. But this type of information can hardly be said to be more prejudicial than the *type of information* published or broadcast in *Rideau* or *Sheppard* or *Murphy*, those cases in which this Court has either upheld convictions in the face of widespread publicity or has strongly implied that the traditional alternatives—change of venue, continuance, *voir dire*, etc.—would have protected the rights of the accused, had the trial court utilized them properly. And it is not possible to say that publication of such information serves no purpose. Not only is it desirable for the public to be generally informed on matters involving the criminal justice system, but even with respect to publication of alleged confessions important interests can be served. For example, publication of a confession may lead to press reports that such a confession was improperly coerced or the confession may implicate other persons whom, but for publicity, the prosecutor might not, for improper reasons, seek to prosecute. The hypotheticals are endless. But that is the point. A direct restraint on the press will cut off the flow of information to the public and by cutting off that flow reduce the benefits, often unpredictable, that an unfettered press has historically brought to the operations of government.

If the type of information restrained here does not justify use of a gag order on the press as opposed to use of the other alternative techniques for protecting the accused, what other factors did the Nebraska Su-

preme Court consider which might justify ignoring the mediating devices?

First, the Nebraska court does mention that state law requires that an accused be tried within six months from the date of the filing of the information, thus implying, although not explicitly considering or holding, that a continuance would not assure trial by an impartial jury. It is important to note that the crime took place in late October, 1975, and that the trial was set for early January, 1976, approximately two and a half months after charges were filed. Thus, the Nebraska courts did not even schedule the trial at the end of the statutorily required period in order to avoid the effects of publicity. In any event, this Court has indicated that a relatively short delay between an arrest, accompanied by massive publicity, and the subsequent trial can ensure a fair trial. *See, Beck* v. *Washington*, 369 U.S. 541, 556-57 (1962) (9½ months); *Murphy* v. *Florida, supra*, 421 U.S. at 802 (7 months). *See also, Calley* v. *Callaway, supra*, 519 F.2d at 208 (citing cases in which there is relatively short span between arrest, attended by publicity, and trial).

Second, the Nebraska Supreme Court does mention that a change of venue may be had to adjacent counties, but it then notes that the adjacent counties have relatively small populations, again implying, without expressly considering or holding, that a change of venue will not protect the accused. But the Nebraska high court does not analyze why a change of venue to an adjacent county won't provide some safeguard, except to note generally that the "area in which the jury may be selected is served by several radio stations, two television stations and several newspapers in addition to those mentioned." Cert. Pet'n Appendix 60a. Nor did the Nebraska Court consider whether the state venue statute would have to give way to the defendant's constitutional right to trial by an impartial jury and whether, therefore, defendant's trial could be moved, if defendant wished, to another more distant and more populous county within the state. *Cf. Irvin* v. *Dowd, supra*, 366 U.S. at 720-21 (suggesting that, but for liberal construction put on state statute that facially limited change of venue in criminal trials, such a statute could be constitutionally infirm).

Third, as noted, neither the Nebraska District Court nor the Nebraska Supreme Court discussed any facts or gave any reason why other techniques for reducing the impact of pretrial publicity, such as voir dire, change of venire or silence orders directed to lawyers, parties and witnesses, would not guarantee the accused an impartial jury.

Thus, there is nothing on this record which suggests that the alternative techniques for protecting the rights of the accused would not be effective in this case. *Amici* thus respectfully submit that this Court should hold that the Nebraska courts violated the Constitution in imposing prior restraints on the press and in not seeking to use the "mediating" devices which this Court has approved as the proper method for accommodating the rights of the press and the rights of the accused.[33]

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[33] By imposing a prior restraint on the press, courts would foreclose the possibilities of refining the alternative techniques for protecting the accused from pretrial publicity. Cessation of news coverage would reduce claims of prejudicial pretrial publicity. And thus trial and appellate courts would not have records from which they could continue the process of developing precise rules for deciding the circumstances under which the alternative techniques would provide protection from extensive publicity to an accused.

In the end, the Nebraska Supreme Court has failed to heed the teaching simply but forcefully expressed in *Sheppard*: "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." 384 U.S. at 350. The Nebraska court fails to perceive that the rights of the press and the interests of the accused are, in the long run, not antagonistic, but complementary. It is for this reason that an accommodation of the apparent, immediate conflict between the values at issue through use of alternative techniques must be sought by the trial courts. And it is for this reason, finally, that the Nebraska Court's extreme solution to the free press-fair trial question is unconstitutional.

II. THE ORDER OF THE NEBRASKA SUPREME COURT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

There is a narrow ground for reversing the order of the Nebraska Supreme Court: its scope is totally irrational, and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

The Nebraska Supreme Court quite correctly held that "courts have no general power in any kind of case to enjoin or restrain 'everybody'. Even when acting with jurisdiction in proper cases orders must pertain to particular persons or legal entities over whom the court has in some manner acquired jurisdiction." App. 57a-58a. Accordingly, the court held a prior restraint in this case could bind only the petitioners and no one else. App. 64a. That consequence is simply irrational.

The only characteristic that is common to the petitioners and distinguishes them from other news media is that they attempted to litigate to protect their

First Amendment rights, which were affected by the original gag order entered by the County Court. Because they tried to intervene in the District Court criminal case, the Nebraska Supreme Court held them bound by its gag order. Other Nebraska media, including the *Omaha Sun,* one of the *amici* herein, were not bound by the gag order, and therefore were free to publish all of the materials which the petitioners were restrained from publishing. The same is true of all of the other *amici* in this case, and indeed, of all the news media in the world, save for the petitioners. The dividing line between the petitioners and the other news media whose publications reached Lincoln County, Nebraska was not drawn pursuant to any rational principle. Even if measured against the full range of constitutionally permissible state interests, it makes no sense at all.

Here, as in *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972), "the equal protection claim . . . is closely intertwined with First Amendment interests . . . ." In a series of cases, this Court has held that when the government regulates opportunities to communicate with the public, it must do so in a fair and even-handed manner, and, at the very least, in a rational manner. Where First Amendment interests are at stake, a state may not permit to some what it denies to others. *E.g., Niemotko* v. *Maryland,* 340 U.S. 268, 272-73 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67, 69 (1953); *Cox* v. *Louisiana,* 379 U.S. 536, 557 (1965); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503, 510 (1969); *Police Department of the City of Chicago* v. *Mosley, supra.* Even under the "reasonable basis" test used in equal protection analysis of economis classifications,

e.g., Dandridge v. *Williams,* 397 U.S. 471 (1969), the classification made by the Nebraska Supreme Court could not survive: for it is based not on reason, but on happenstance.

Nor can the order be saved under the principle of *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955), that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." The rights at stake are First Amendment rights. They can be restricted only by regulations or orders that are narrowly and precisely drawn so as to serve only a compelling state interest by the least restrictive means *E.g., NAACP* v. *Button,* 371 U.S. 415, 439 (1963); *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); *DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825, 829 (1966). There can be no compelling interest in muzzling some Nebraska news media while leaving others free to report and comment. A restrictive order covering all and only those who asserted their First Amendment rights in court is not precisely drawn.[34] And if it is precisely drawn with that effect in view, it imposes a palpably unconstitutional burden on the assertion of First Amendment rights.

The fact that the Nebraska courts could not reach news media who were not parties in a proceeding before them does not justify their imposing a restraint on those media who happened to be parties. Rather, that fact required the Nebraska courts to refrain from gagging any of the media, and to employ other methods for protecting the interest in a fair trial—methods that

[34] Nor, of course, was the drafting done by a "legislative mind." The order cannot be upheld on the basis of the deference owed to a coordinate branch which has made a political judgment.

would not impose haphazard infringements on First Amendment rights.

III. THIS CASE IS NOT MOOT, AND SHOULD BE DECIDED ON ITS MERITS.

This Court has consistently recognized that a case does not become moot once a specific controversy between parties has terminated if the controversy is "capable of repetition, yet evading review." *Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911) (decision on the validity of an ICC order after the order had expired); *Roe* v. *Wade,* 410 U.S. 113 (1973) (decision on constitutionality of anti-abortion statute after termination of petitioner's pregnancy); *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973) (decision on constitutionality of registration requirement after petitioner had satisfied the requirement); *Carroll* v. *President and Comm'rs of Princess Anne,* 393 U.S. 175 (1968) (decision on constitutionality of injunction after it had expired).

Under the "capable of repetition, yet evading review" standard, immediate review of the gag order in this case is required even though the order has expired. The constitutional questions presented by this gag order are not unique to this case, for numerous other orders restricting press publication of information during pre-trial and trial proceedings have been issued by a variety of courts in recent years, including courts in Washington,[35] California,[36] Florida,[37] Louisi-

[35] *State* v. *Sperry,* 79 Wash. 2d 69, 483 P.2d 608, *cert. denied sub. nom. McCrea* v. *Sperry,* 401 U.S. 939 (1971).

[36] *Sun Co. of Bernadino* v. *Superior Court,* 29 Cal. App. 3rd 815, 105 Cal. Rptr. 873 (1973).

[37] *State ex rel. Miami Herald Pub. Co.* v. *McIntosh,* 320 So. 2d 861 (Fla. Dist. Ct. App. 1975), *cert. granted,* 322 So. 2d 544 (Fla. 1975).

ana,[38] Pennsylvania,[39] New York,[40] Indiana,[41] Arkansas,[42] and Maine.[43] In addition, a Virginia court has imposed a criminal conviction on a newspaper under a statute imposing a prior restraint on news reports concerning the Virginia Judicial Review Commission.[44]

Since gag orders directed against the press are generally applicable only during pre-trial or trial proceedings, and such proceedings often last only a few days or weeks and only rarely last more than a few months, Supreme Court review of a gag order still in effect is virtually impossible. For example, the four gag orders in the *Simants* case remained in effect for a total period of less than three months, thus effectively prohibiting Supreme Court review of the orders while they remained in force.[45] Under the Circumstances, it is imperative that this Court review the constitutionality of this gag order even though the order has expired.

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[38] *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974).

[39] *United States* v. *Schiavo*, Nos. 73-1855 and 73-1856 (3rd Cir., Aug. 8, 1974).

[40] *Oliver* v. *Postel*, 30 N.Y. 2d 171, 331 N.Y.S. 2d 407, 282 N.E. 2d 306 (1972); *People* v. *Carson*, New York Times, Jan. 16, 1976, p. 1, cols. 6-7.

[41] *State* v. *Dauber*, No. 6855 (Marshall Cir. Ct., Ind., April 11, 1973).

[42] *Wood* v. *Goodson*, 485 S.W. 2d 213 (Ark. 1972).

[43] See Brunswick, Maine *Times Record*, April 23, 1973.

[44] *The Washington Post*, Jan. 16, 1976, at C1, col. 7-8.

[45] *See also Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U.S. 1301 (1974) (Powell, J., in chambers), dismissed as moot, 420 U.S. 985 (1975).

Two additional reasons support immediate review of this order. At present there is a state of mass confusion as to the constitutionality of such orders. For example, the three Nebraska courts that passed constitutional judgment on gag orders in the *Simants* case reached three different conclusions, and when presented with a stay application, Mr. Justice Blackmun reached yet a fourth conclusion. Moreover, every time the gag orders in this case were reviewed, their scope was cut down. The history of this case thus illustrates the need for appellate review to protect First Amendment rights.

Elsewhere in the country, courts are imposing a startling array of gag orders directed against the news media, including such actions as excluding the press from reporting public pre-trial judicial proceedings,[46] barring publication for six months of the names of public witnesses,[47] forbidding publication of an opinion as to guilt or innocence,[48] limiting news media coverage to a single pool reporter,[49] banning publication of a public jury verdict,[50] and requiring reporters to sign an agreement not to report certain portions of public court proceedings as a condition for admittance into the courtroom.[51] In view of the number, variety, severity, and short-term nature of gag orders, constitutional guidance from this Court is sorely needed.

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[46] *State* v. *Sperry, supra.*

[47] *Sun Co. of Bernadino* v. *Superior Court, supra.*

[48] *People* v. *Green*, Nos. L 2814F through L 28150 (Mun. Ct. of San Francisco, Dept. 19, May 9, 1974).

[49] *State* v. *Dauber ,supra.*

[50] *Wood* v. *Goodson, supra.*

[51] See Brunswick Maine *Times Record*, April 23, 1973.

Second, the urgent need for immediate review of gag orders directed against the press is exacerbated because such orders place First Amendment rights in serious jeopardy. Unless this Court rules on the constitutionality of such orders, there is a substantial likelihood that trial courts will issue gag orders in the future which violate the First Amendment rights of the press and the public. Under the rule set forth by this Court in *Walker* v. *Birmingham,* 388 U.S. 307 (1967), a party may not disobey an unconstitutional court order, but must obey it pending appeal. The implication is that even violation of an unconstitutional court order and a contempt conviction would not preserve for appellate review the question of the validity of the original order. Indeed, the Fifth Circuit has held that violation of a gag order is an adequate ground for sustaining the conviction of a reporter even though the gag order itself could not "withstand the mildest breeze emanating from the Constitution." *United States* v. *Dickinson,* 465 F.2d 496, 500, 509-14 (5th Cir. 1972), 476 F.2d 373 (5th Cir.), *cert. denied,* 414 U.S. 979 (1973). Thus, the *only* way this Court is likely to be able to rule on the constitutionality of direct prior restraints on the press in the context of criminal trials is in circumstances like those presented here. *Pacific Terminal* and its progeny provide ample precedent for deciding this case on its merits. The character of the rights at stake and the clear need for guidance from this Court fully justify following that precedent here.

CONCLUSION

For nearly 200 years—through civil and global wars, economic depression and domestic violence—this Nation has struggled and risen to be the world's greatest

democracy, without any judicially imposed prior restraints on news reporting.

For nearly 200 years this Nation has lived its profound belief and unwavering conviction that prior restraints on news reporting are anathema to the First Amendment to the Constitution. There have been occasions when mayors and governors, private and public interests, generals and admirals, diplomats and intelligence agents, judges and presidents, have attempted in one way or another to block publication of particular facts. On those occasions when such attempts have been subjected to constitutional scrutiny, without exception they have been struck down in the face of the First Amendment. On many occasions, this Court has reminded all of us that prior restraints on news reporting are incompatible with the First Amendment to our Constitution.

For nearly 200 years the rights protected by the First and Sixth Amendments have flourished in congenial constitutional brotherhood. Neither Amendment has been used to diminish the power and majesty of the other. Notorious trials and bizarre murders are part of the public and contemporaneous history of our Nation, while secret trials and hidden torture are part of the underground history of totalitarian states.

There are indeed problems with the criminal justice system in America. Crime continues its ugly and mean rise; the vast majority of perpetrators of criminal acts go unapprehended. Police sometimes abuse the citizens and at others are abused by them. Courts are overwhelmed and judges are underpaid. But none of these problems are caused by the absence of prior restraints. Indeed some of the most severe problems of our crim-

inal justice system, such as the inadequacies of our prisons and the corruption of too many state and local judges, prosecutors and lawyers, persist because the cleansing light of press coverage has not yet illuminated them for public attention.

For nearly 200 years there have been fair and public trials in these United States, with no prior restraints. Indeed, one essence of a fair trial has been the constitutional mandate that trials be public.

This is no time in our history for this or any other court to discard two centuries of experience and cast aside one of the most precious rights guaranteed by the First Amendment.

For the foregoing reasons the judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that three printed copies of the foregoing Brief for The Washington Post Company, *et al.*, *Amici Curiae,* were mailed, first class mail, postage prepaid, this 26th day of January, 1976 to each of the following:

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/s/ RICHARD M. COOPER
Richard M. Cooper

APPENDIX

Appendix

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January 7, 1976

Mr. Richard M. Cooper
Williams, Connolly & Califano
1000 Hill Building
Washington, D. C. 20006

Dear Mr. Cooper:

In response to your letter of January 2. 1976 to Stephen T. McGill of this law firm, please be advised that you have our consent to your filing an amicus brief on behalf of a group of news media, including The Washington Post, in the United States Supreme Court in *Nebraska Press Association* v. *Stuart,* No. 75-817. We also consent to having the amicus brief filed no later than January 26, 1976.

Yours very truly,

/s/ JAMES L. KOLEY
James L. Koley

JLK:jh

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
State Capitol
Lincoln, Nebraska 68509
402/471-2682

January 6, 1976

Richard M. Cooper, Esq.
Williams, Connolly & Califano
1000 Hill Building
Washington, D. C. 20006

Dear Mr. Cooper:

This will acknowledge my receipt of your letter of 2 January 1976 wherein you request my permission to file an *amicus* brief in the United States Supreme Court in the case of *Nebraska Press Ass'n* v. *Stuart*, No. 75-817.

I hereby grant your request and consent to your filing in the above cited case an *amicus* brief pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States.

Very truly yours,

PAUL L. DOUGLAS
Attorney General
/s/ HAROLD MOSHER
Harold Mosher
Assistant Attorney General

HM:saa

MILTON R. LARSON
LINCOLN COUNTY ATTORNEY
LINCOLN COUNTY COURTHOUSE
North Platte, Nebraska 69101
Phone 534-4350, Ext. 270

January 14, 1976

Williams, Connolly & Califano
1000 Hill Building
Washington, D.C. 20006

RE: Nebraska Press Ass'n v. Stuart No. 75-817

Attention: Mr. Richard M. Cooper

Dear Mr. Cooper:

This will acknowledge receipt of your correspondence under date of January 2, 1976. I take this opportunity to apologize for the delay in my response.

On behalf of the State of Nebraska, I hereby consent to the filing of an amicus brief on behalf of a group of news media, including The Washington Post, in the above-captioned action, and that the same should be filed not later than January 26, 1976.

Very truly yours,

/s/ MILTON R. LARSON
Milton R. Larson
County Attorney

MRL:sj

BEATTY, MORGAN & VYHNALEK
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20 January 1976

Williams, Connolly, & Califano
Attorneys at Law
1000 Hill Building
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Attention: Richard M. Cooper

RE: Nebraska Press Assn v. Stuart
No. 75-817

Dear Mr. Cooper:

Enclosed is your letter of January 2, 1976 showing our signature for consent to file a brief amicus curiae.

Very truly yours,

BEATTY, MORGAN & VYHNALEK
By /s/ LEONARD P. VYHNALEK
Leonard P. Vyhnalek

7/hc
Enc

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January 2, 1976

Leonard P. Vyhnalek
820 West First Street
North Platte, Nebraska 69101

Dear Mr. Vynhalek:

Pursuant to our telephone conversation, I am writing to ask your consent to our filing an *amicus* brief on behalf of a group of news media, including *The Washington Post*, in the United States Supreme Court in *Nebraska Press Ass'n* v. *Stuart*, No. 75-817. I would further request that you consent to have the *amicus* brief filed not later than January 26, 1976, which is 45 days after the granting of certiorari by the Court on December 12.

If you do consent as requested in this latter, please so indicate by signing below.

Thank you for your consideration.

Sincerely,

/s/ RICHARD M. COOPER
Richard M. Cooper

RMC:dmr
Consent granted as requested:

/s/ LEONARD P. VYHNALEK
Leonard P. Vyhnalek